

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1996 SESSION

<p>FILED</p> <p>February 12, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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TOMMY L. KING

Appellant,

V.

STATE OF TENNESSEE,

Appellee.

)
) C.C.A. No. 01C01-9512-CC-00415
)
) Maury County
)
) Honorable James L. Weatherford, Judge
)
) (Post-Conviction: Felony Murder)
)
)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

OPINION

The appellant, Tommy L. King, was indicted for felony murder, first degree murder, and armed robbery. He was convicted of felony murder and sentenced to death. The Tennessee Supreme Court affirmed his conviction and sentence. The appellant's first post-conviction relief petition was denied. The appellant filed a second petition for post-conviction relief. The trial court denied relief and dismissed the petition. The appellant appeals this dismissal raising the following issues for our review:

1. Whether the sentence of death should be set aside because of the jury's consideration of an improper aggravating circumstance;
2. Whether the trial court's instructions on reasonable doubt were constitutionally infirm;
3. Whether the trial court erred in improperly instructing the jury on the meaning of a life sentence;
4. Whether the imposition of the death penalty is constitutionally infirm due to the prosecutor's improper jury argument;
5. Whether Tennessee's felony murder statute is unconstitutional;
6. Whether the death penalty violates the appellant's fundamental right to life;
7. Whether the appellant's conviction is infirm due to ineffective assistance of counsel; and
8. Whether the trial court erred in not allowing the appellant funds for expert assistance.

Upon reviewing the record, we find no reversible error. The judgment of the trial court is affirmed.

FACTS

In May 1982, the appellant and an accomplice entered a Columbia tavern armed with a .357 caliber handgun. The appellant fired a shot into the ceiling and instructed the owner and three patrons to lie down on the floor. He and his accomplice proceeded to rob each person. He also rifled the tavern's cash register taking cash and the owner's car keys.

At some point during the robbery, the appellant fatally shot the owner of the tavern in the neck. He and his accomplice made their escape in the tavern owner's vehicle.

The appellant was apprehended in Chattanooga the following day. The victim's car and the .357 handgun were found in the appellant's possession.

I

The appellant contends that one of the three aggravating circumstances relied upon by the jury in imposing the death sentence was constitutionally impermissible. The aggravating circumstances found by the jury were: (1) that the murder was committed during the perpetration of an armed robbery; (2) the appellant knowingly created a great risk of death to two or more persons other than the victim; and (3) the appellant had been previously convicted of crimes involving violence or threat of violence to the person.

The appellant is correct in his contention that the use of the felony murder aggravating circumstance duplicates elements of the charged offense and is, therefore, constitutionally impermissible. State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992). A harmless error analysis is appropriate for this Court's review of a penalty phase's use of an invalid aggravating circumstance. State v. Smith, 893 S.W.2d 908, 925 (Tenn. 1994). In order for this Court to uphold the

sentence, we must conclude that the result would have been the same had no weight been given to the invalid aggravating factor. Id.

In conducting our review, we must examine the entire record for the presence of factors which potentially influenced the sentence ultimately imposed. Id. These factors include the number and strength of remaining valid aggravating circumstances; the prosecutor's argument at sentencing; the evidence admitted to establish the invalid aggravator; and the nature, quality, and strength of mitigating evidence. Id.

In the present case two valid aggravating factors were clearly established. The appellant had two prior felony convictions involving the use of or threat of personal violence. Also, the state presented proof that the appellant created great risk of death to two or more persons other than the victim during the course of the homicide. The proof supporting these two aggravating factors is overwhelming. Very little evidence of mitigation was offered. During the prosecutor's closing argument at sentencing, little emphasis was placed on the invalid aggravator. Furthermore, no additional evidence was introduced to support the invalid aggravating circumstance.

We conclude that the sentence would have been the same had the jury given no weight to the invalid felony murder aggravating factor. This issue is without merit.

II

The appellant next contends that the trial court's instructions on reasonable doubt were constitutionally infirm. Specifically, he claims that the guilt phase instruction lowered the state's burden of proof. He alleges that the penalty phase instruction was too unspecific to provide meaningful guidance to

the jury. The appellant raises this issue for the first time in this, his second post-conviction petition. Therefore, this issue has been waived. Tenn. Code Ann. § 40-30-112 (1990 Repl.)

Notwithstanding waiver, the same or similar instructions have been found constitutional and upheld on many occasions. See State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994); State v. McPherson, 882 S.W.2d 365, 374-75 (Tenn. Crim. App. 1994); State v. Hallock, 875 S.W.2d 285, 294 (Tenn. Crim. App. 1993). We conclude that both instructions sufficiently described the degree of doubt necessary for acquittal and did not lower the state's burden of proof. This issue is without merit.

III

The appellant next contends that the jury should have been given an instruction on the meaning of a life sentence. He alleges that this instruction would have allowed the jury to clearly focus on their options, i.e., a life sentence or the death penalty. He claims that without a clear understanding of what a "life sentence" means, the jury might have speculated about the sentence becoming subject to future commutation. As a result, he argues the jury was more inclined to impose a harsher sentence. The appellant raises this issue for the first time in this, his second post-conviction petition. Therefore, the issue has been waived. Tenn. Code Ann. § 40-30-112 (1990 Repl.)

IV

The appellant next contends that his conviction should be reversed because of improper jury argument by the prosecutor. He argues that the prosecutor improperly stated that he was on probation at the time of the murder.

He contends that this created the inference that he was beyond rehabilitation and affected the jury's sentencing determination.

The appellant raises this issue for the first time in this, his second post-conviction relief petition. Therefore, this issue has been waived. Tenn. Code Ann. § 40-30-112 (1990 Repl.)

V

The appellant next contends that Tennessee's felony murder statute violates due process and equal protection by failing to require any mens rea within the definitional elements for felony murder. This issue has been previously determined on direct appeal. State v. King, 694 S.W.2d 941 (Tenn. 1985). Notwithstanding this issue's previous determination, the Supreme Court has consistently held our felony murder statute constitutional. See Farmer v. State, 296 S.W.2d 879 (Tenn. 1956); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992). This issue is without merit.

VI

The appellant next challenges the constitutionality of the death penalty. He asks this Court to "come to the simple conclusion that [the death penalty] smacks of an inherent constitutional infirmity since it violates that which human kind holds most dear: Life itself." The appellant raises this issue for the first time in this, his second post-conviction petition. Therefore, the issue has been waived. Tenn. Code Ann. § 40-30-112 (1990 Repl.)

Notwithstanding waiver, we note that one of the state's most basic functions is to enforce the penal laws as established by the legislature. We

quote from the United States Supreme Court decision, Gregg v. Georgia, 428 U.S. 153, 183, 96 S. Ct. 2909, 2930 (1976):

[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

Furthermore, the appellant's claim is contrary to well settled law. The Tennessee Supreme Court has held that the state's death penalty statute, per se, meets due process requirements. State v. Black, 815 S.W.2d 166, 190 (Tenn. 1991). This issue is without merit.

VII

The appellant next contends that he was deprived of due process of law by his prior trial counsel's and his post-conviction counsel's ineffective assistance. The effectiveness of the appellant's trial counsel has been previously determined. The effectiveness of the appellant's post-conviction counsel is not a cognizable claim under Tennessee's Post-Conviction Relief Act. State v. Oates, 698 S.W.2d 79, 81 (Tenn. Crim. App. 1985). The right to appointed counsel extends to the first appeal as of right and no further. Id.; House v. State, 911 S.W.2d 705, 711-12 (Tenn. 1995). The appellant has no constitutional right to counsel when mounting a collateral attack on his conviction. Id. at 712. This issue is without merit.

VIII

The last issue raised by the appellant alleges that the trial court erred in denying his motion for funds for expert assistance. He claims that the denial was improper because he has made the required threshold showing that there was a reasonable likelihood that the assistance requested would have materially assisted him in the presentation of his case.

Our Supreme Court has held that to obtain authorization for funds for support services “the defendant must show that a substantial need exists requiring the assistance of state paid supporting services and that his defense cannot be fully developed without such professional assistance.” State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992). Likewise, the denial of a request for funds to employ an expert when the request “was accompanied by little more than undeveloped assertions that the services were needed to attempt to counter the state’s proof” was appropriate. State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994).

The Supreme Court has previously announced the appropriate standard to be applied for determining when support services are appropriate in post-conviction settings. Owens and Payne v. State, 908 S.W.2d 923 (Tenn. 1995). A petitioner will not be entitled to an expert or investigator solely to assist in searching for infringements. Id. at 928. The entitlement arises only upon a demonstration of specific factual proof that the services of an expert or an investigator are necessary to establish a ground for post-conviction relief and that the appellant is unable to establish that ground by available evidence. Id.

Upon review of the hearing transcript on the motion for expert services, we find that the denial of the appellant’s request was proper. The appellant failed to establish any cognizable need for expert services. He offered no proof that expert assistance was necessary to establish a viable ground for post-conviction relief. The appellant has not met his burden. This issue is without merit.

CONCLUSION

Upon review of the record, we find no error of law mandating reversal. The judgment of the hearing court is affirmed. This Court sets an execution date of April 27, 1997.

PAUL G. SUMMERS, Judge

CONCUR:

(SEE CONCURRING OPINION)
GARY R. WADE, Judge

L. T. LAFFERTY, Special Judge